No. 713.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

F. W. COLER,

Appellant,

vs.

HENRY F. ALLEN, JOHN H. McGRAW, as Receiver, and PACIFIC NORTHWEST PACKING COMPANY (a corporation), and THE PACIFIC NORTHWEST PACKING COMPANY (a corporation),

Appellees.

Appellant's Brief on Motion to Dismiss.

Appellant's Motion for Alias Citation.

BAUSMAN & KELLEHER,

Counsel for Appellant.

LOWMAN & HANFORD S. & P. CO., SEATTLE.

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APPELLANT'S BRIEF ON MOTION TO DISMISS. APPELLANT'S MOTION FOR ALIAS CITATION.

Coler, appellant, was allowed to intervene in complainant Allen's foreclosure of two mortgages, and attacked the second (p. 55) of them as void against him, a judgment creditor of one of the mortgagor defendants. The *complainant* (and no one else) opposed the complaint in intervention and successfully demurred to it

(64-9). Thereafter the following decree (69) was entered against the intervenor:

"Wherefore, it is by the Court here and now ordered and adjudged that the complaint in intervention heretofore filed herein by F. W. Coler be, and the same is hereby, dismissed; and that complainant be not required to further answer the said complaint."

No other parties are in any way referred to in this decree. Coler, appealing from it, served citation upon complainant and the foreclosure receiver. It is now insisted that his appeal should be dismissed because he has not served his citation or otherwise impleaded in appeal the other defendants. We will accordingly examine this contention as to each of the defendants in turn.

1. *Pacific Northwest Packing Company.*

This defendant had not a shadow of interest in the controversy between Coler and complainant Allen, and for two reasons. *First*, the mortgage attacked by Coler is the *second* of the two mortgages (55). That was executed by this defendant's successor *The* Pacific Northwest Packing Company (16). There are two companies, distinguished only by the article "The" (2). *Second*, as the bill itself distinctly alleges, this defendant had, before the foreclosure, transferred all its assets, and its liabilities also, to its successor (2). The authorities are consequently clear that this defendant was an utterly unnecessary party to the appeal. (*Mills v. Provident Life & Trust Co.*, 100 Fed. 344, 9th C. C. A.) *Third*, there is now filed in this court the consent

of this defendant to the hearing of this appeal and a waiver of citation. The authorities to support this step will be cited later.

To all this it may be added, first, that this defendant never appeared in the action, and, second, that it is no way referred to in the decree against Coler, by whom, as already stated, it had been in no way attacked.

2. *THE Pacific Northwest Packing Company.*

The appeal cannot for several reasons be dismissed on account of omission to serve this defendant.

First, the decree complained of by Coler did not mention this defendant and was not against its interests, so as to afford it a right to appeal and trouble this court with a second hearing. The controversy was consequently altogether *severable* as to Coler and Allen. It was not an appeal from final foreclosure decree as in *Davis v. Mercantile Trust Co.*, a decree against the mortgagor, which it also would be presumed to be grieved with and from which it might later take an appeal to the second burden of this court.

We have not yet seen appellees' brief, but we have no doubt it will cite such cases as *Masterson v. Herndon* and *Davis v. Mercantile Co.*, and from this court, perhaps, *Illinois Trust and Savings Bank v. Kilbourne*, 76 Fed. 883. The authority of these cases is most obvious and is cheerfully conceded. Take the last mentioned. Who was appealing? One on whose property or interest a lien or claim had been impressed. The very order appealed from had impressed a lien or

trust upon many others, either in terms or by necessity. Now, every one of these others had a grievance and a right to appeal. To cut these off by citation, so as to prevent a swarm of other appeals, is so clearly necessary as not to need discussion. But who was aggrieved here? Coler only, and he alone appeals. (He got no lien on anybody's interest.) He is the only one who did or could appeal, for as to every one else the dismissal of his claim was favorable. Apply, then, the two tests on these motions to dismiss for want of parties. Is this court exposed to another appellant? Clearly not. Is the prevailing party below free to proceed against the others? Clearly, yes.

Second. This defendant also has filed a consent to the present appeal and a waiver of citation. This very just proceeding is allowed by the United States Supreme Court (*Bigler v. Waller*, 12 Wallace, pp. 142, 147). The court there says of defective citations:

"Notice is required by law, and where none is given and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed, but the defect may be waived in various ways *as by consent or appearance* or the fraud of the other party."

And in *Richardson v. Green*, 130 U. S. 104, the court says:

"But the issuing of a citation may be waived by the appellees and a general appearance by them is a waiver."

This court's decision in *Farmers Loan & Trust Company v. Longworth*, 76 Fed. 609, is much in point.

There dismissal was moved for on the ground that two persons *clearly affected adversely* by the order appealed from by the appellant, similarly affected, had been omitted.

"Neither the Northern Pacific Railroad Company nor Andrew F. Burleigh, receiver, joined in the appeal; nor were they, or either of them, served with citation. After the appeal was perfected, and *after a motion had been filed* by the appellees *to dismiss* the same, the receiver by his attorney entered in this court his appearance and consent to the appeal."

Now, did your Honors disregard this? By no means. You gave it full effect. You did dismiss, but only because the *railroad company* had not done what the receiver had. Nay, more, a little while later, discovering that the company also had in fact filed its consent in your court, you recalled the dismissal. (*Farmers Loan & Trust Co. v. Longworth*, 83 Fed. 336).

All that this court looks to, so far as you yourselves are concerned, is that you be not troubled by second appeals on the same controversy. Anything that effectually settles this is enough. So far as the appellee is concerned, who moves to dismiss, there is plenty of good authority that he can waive the objection. In *Buckingham v. McLean*, 13 How. 151, the court observes of notice of appeal "such notice may be waived by entering a general appearance of counsel. Where an appearance is entered the objection that notice has not been given is a mere technicality, and the party availing himself of it should at the first term he appears, give notice of the motion to dismiss *and that his*

appearance is entered for that purpose." On the very day (September 4th) that the present motion to dismiss was served, counsel for the moving party entered into a stipulation for the service of briefs at the present argument. Neither that stipulation nor the motion itself reserves any qualification to the appearance.

It is mentioned in the *Longworth* case, *supra*, that the appearance in this court by the omitted appellees was within six months (the appeal period), but we do not see that to that the court attached much importance. The old summons and severance process probably had some such requirement, but the voluntary appearance by omitted parties is a different thing. The right of the court to allow this sort of thing as a cure is certainly not limited or related to the appeal period. As will be seen later, under our own motion, the power of amending writs of error and citation is freely exercised long after.

3. *Williams, Keene and Claiborne.*

These three defendants, it is argued, should have been cited and served, but to this there is a speedy answer. Not a single line of the intervenor's complaint ever attacked the interest of either or all of these defendants. Coler attacked only a part of complainant Allen's securities, the second real mortgage, and the fishing licenses held in trust for Allen by these three defendants now under consideration are pledges which Coler has not assailed. The property covered by the second mortgage which Coler assails, is a leasehold of harbor area, buildings and equipment (17). The pledge

of the fishing licenses he does not seek to set aside (55). He specifically mentions "the mortgage referred to in paragraph VI" (56). The property covered by that mortgage is very carefully detailed (16–19) by the bill of foreclosure, and no mention is made of these licenses or of these defendants who hold them in trust.

Finally, if he did attack the pledge of these licenses, who is the real party in interest? It is for Allen that Williams, Keene and Claiborne hold these licenses in trust. That is the averment of the foreclosure bill itself (28–30), and Allen, the real party in interest, is now in court properly cited and appearing. It is noticeable, also, that as to these defendants a decree had been taken *pro confesso* (46) before Coler intervened.

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MOTION FOR AMENDMENT OF CITATION.

To the Honorable the Judges of the above entitled court:

Appellant respectfully moves the court for an order allowing amendment of the citation herein so as to

include the names of Austin Claiborne, W. M. Williams, and W. A. Keene, defendants in the lower court, and that the cause stand over until these defendants be brought in.

BAUSMAN & KEILEHER,

Counsel for Appellant.

ARGUMENT ON FOREGOING MOTION.

The practice allowing amendment and postponement is settled.

Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572.

Richardson v. Green, 130 U. S. 104.

Evans v. Bank, 134 U. S. 330.

Dodge u. Knowles, 114 U. S. 430.

Altenberg v. Grant, 83 Fed. 980.

Railroad Equipment Company v. Southern Ry. Co., 92 Fed. 541.

Jacobs v. George, 150 U. S. 415.

The substance of these decisions is that citation is no part of the jurisdictional necessity. That depends upon due filing of transcript. As to the citation the court says:

"It is not jurisdictional. Its only purpose is notice. If by accident it is omitted a motion to dismiss an appeal allowed in open court and at the proper term will never be granted until an opportunity to give the requisite notice has been furnished."

Dodge v. Knowles, supra.

"A motion to dismiss in *Richardson v. Day*, No. 181, must be granted unless the appellants therein shall procure and cause to be issued and served on the appellees therein a citation from this court, in the terms before set forth, returnable at the next term thereof," etc., etc.,

Richardson v. Green, *supra*.

There were in that case a number of parties, some appearing and some omitted.

In *Railroad Equipment Co. v. Southern Ry. Co.*, *supra*., where there were a number of parties, the court says:

"The difficulty which the appellant meets at the threshold of the cause is that it has not made the East Tennessee, Virginia & Georgia Railway Company a party to the appeal by serving a citation upon it. * * * The order will be that the cause stand over for the purpose of giving the appellant an opportunity to apply for a citation against the East Tennessee, Virginia & Georgia Railway Company."

The federal appellate procedure is, so to speak, *in rem*, whilst that of the states is commonly *in personam*. In the former practice, jurisdiction is obtained by two acts, the order of a judge granting that the appeal be allowed and the "cause transferred", and, second, by the lodgment of that cause, by its record, in the appellate court. The citation to the opposite parties is simply notice that the jurisdictional steps have been, or are being, taken, and is no more essential to jurisdiction than, after a seizure in Admiralty, notice or other steps to claimant would be thereafter jurisdic-

tional there, or notice of filing petition in a removal from state to federal courts.

Amendments, accordingly, and fresh citations have been freely allowed in the discretion of the court without regard to the time already elapsed or the running of the appeal period. (*Inland & Seaboard Coasting Co. v. Tolson*, *supra*). In the case of *Evans v. Bank*, *supra*, the court says:

"*The filing of the record* in this case under the second appeal during the term succeeding its allowance, *sufficed for the purpose of jurisdiction*, which was not defeated by the failure to obtain a citation or give bond within two years from the rendition of the decree."

That was an appeal from the circuit court to the supreme court, the period for which is by *Revised Statutes*, sec. 1008, limited to two years. So in *Altenberg v Grant*, *supra*, *alias* citation from appellate court is held proper after time has expired for writ of error.

All this liberality is plain enough when we remember two things; first, that it is the lodgment of the cause and not service of the notice or citation that gives jurisdiction, and, secondly, the provisions of the *Revised Statutes*, sec. 1005. The latter, as is well known, so far requires the allowance of amendments that Justice Curtis said of it: "It is difficult to see, in reading it, what defect cannot now be amended in the discretion of the court" (*Foster, Fed. Pr. 1st ed.* p. 603). Section 1005 refers only to writs of error, but section 1012 makes all "rules, regulations and restrictions" applicable to writs of error apply also to appeals.

Some few cases are found where the proposed amendment was denied because of inexcusable delays, and some few others, where the amendment was too radical, as where the parties were jointly named in a money judgment against them, but in the overwhelming mass of cases it has been granted where asked for: This is especially true since the amendment provision of the Revised Statutes, Sec. 1005. Cases before this enactment must be scrutinized a little. The history and effect of this legislation is described by Mr. Justice Gray in *Walton vs. Marietta Chair Co.*, 157 U. S. 347.

In *Inland & Seaboard Coasting Co. v. Tolson*, *supra*, the court had already dismissed for want of a portion of the parties on appeal, but restored the cause and then allowed amendment and new citation.

We feel it improbable the court will regard the omitted parties as essential to this hearing, but, if it does, the allowance of amendment and fresh citation is so clearly proper as to need, we think, no further argument.

BAUSMAN & KELLEHER,

Counsel for Appellant.